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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 10 2005
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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO), dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen.[1] The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel harshly criticized the director, challenging not only his conclusion but also the integrity of the entire Service Center. While the AAO withdrew the director's determination that the proposed benefits of the petitioner's work would not be national in scope, the AAO upheld the director's ultimate conclusion that a waiver of the job offer requirement was not warranted in the national interest.

On motion, counsel now challenges the integrity of the AAO, asserting that we are "complicit" in the Service Center's alleged malfeasance and that the adjudicator was an "Apologist for the bad Nebraska examiner." Counsel characterizes the AAO's decision as "very poor" and our concerns as "hogwash," "pure fiction" and "garbage, pure and simple." Counsel implies that the AAO upheld the director's decision because the AAO disfavors contradicting another Citizenship and Immigration Services (CIS) employee. Counsel suggests that pervasive prejudice both at the Service Center and at the AAO, rather than a review of the record, has guided the decisions in this matter. Counsel implies that only a reversal of our previous decision could allay his concern that we have prejudiced his client.

We will address counsel's specific arguments below. Overall, however, counsel's assertions seriously mischaracterize the AAO's decision. Only one of counsel's assertions, that some citation evidence was not discussed, is supported by the record.

The AAO's seven-page decision reflects a careful analysis of the evidence. While counsel disagrees with the AAO's bases for concluding that the evidence is insufficient, the bases were clearly set forth in the decision, advising counsel and the petitioner what information was lacking.

Counsel's implication that the AAO's dismissal of his earlier claim of prejudice represents a "knee jerk denial" of that claim is not supported by the AAO's decision. A reading of what the AAO actually said in its decision reveals that the AAO provided a reasoned explanation for its rejection of the prejudice claim. The AAO stated on page 7 of its decision that it was dismissing counsel's claim of prejudice because the director's initial denial of the petition could be logically explained without resorting to assumptions of prejudice or personal animosity towards counsel or the petitioner. Thus, the AAO considered counsel's claims and found them unpersuasive.

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[1] Counsel characterizes the motion as a motion to reopen. While the petitioner does submit some new documents on motion, most of motion consists of legal arguments, making it more akin to a motion to reconsider. *See generally* 8 C.F.R. § 103.5(a)(2) and (3).

Curiously, counsel both accuses the AAO of disfavoring reversing the decisions of other CIS officers while acknowledging that the AAO has reversed decisions by the California Service Center. Counsel offers no *rational* explanation, and we can think of none, for the AAO's alleged refusal to reverse "poor" decisions from the Nebraska Service Center while reversing similar decisions from the California Service Center.

Finally, the implication that only an approval of the underlying petition can resolve counsel's claims of prejudice is not persuasive. Rather, we find that a well-reasoned decision, such as our previous one, satisfactorily demonstrates that a failure to demonstrate eligibility, rather than prejudice, is the rational explanation of the decisions relating to the instant petition. Counsel's submission of a single-page from an alleged decision by the Nebraska Service Center downplaying a large number of citations cannot establish a pattern of prejudice at that office.[2]

Counsel's assertions relating to specific parts of the AAO's decision will be discussed below.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

CIS has never contested that the petitioner is an advanced degree professional. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and

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[2] While that decision is not before us and involves a different classification than the instant petition, we note that this office typically finds citation evidence to be most relevant to the scholarly articles criterion pursuant to 8 C.F.R. § 204.5(h)(3)(vi). The single page submitted by counsel does not address that criterion. Regardless, without the record of proceedings before us, we cannot reach any conclusion regarding the propriety of that decision.

proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO acknowledged that the petitioner works in an area intrinsic merit, protein chemistry, and that the proposed benefits of his work, improved drug design, would be national in scope. Thus, counsel's continued criticism of the director for failing to find that the petitioner's work could produce national benefits need not be addressed.

The AAO then concurred with the director that the petitioner had not established that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Specifically, the AAO found that the general assertions that the petitioner's work has potential implications for the pharmaceutical industry was not supported by that industry and that the petitioner's citation history was not indicative of his influence in the field.

On motion, counsel asserts that the AAO made "several outright misstatements of fact" and made "many innuendos which imply either the facts were not understood or known." First, counsel correctly notes that the AAO only considered citations for a single article when, in fact, the petitioner provided evidence of citations for two articles.[3] Initially, the petitioner submitted a May 28, 2002 printout from an electronic citation database indicating that the petitioner's 2000 article in the *Journal of the Chemical Society* received seven citations and his 1998 article in *Chemistry Letters* received four citations. Our current review of the

[3] The citation evidence is located at two separate places in the file, suggesting the omission was inadvertent.

citation evidence reveals that the seven citations were all independent and that one of the four citations was a self-citation. While counsel submits evidence of post-filing citations on appeal, those citations cannot establish the petitioner's eligibility as of the date of filing. *See generally* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

We decline to withdraw the AAO's decision for failure to address a single, minimally cited article. While counsel asserts on motion that "being cited 10 times in this field is very significant," the assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Moreover, as stated in our previous decision, page 6, counsel's claims regarding this petition have been "hyperbolic and exaggerated" and "demonstrably unreliable." We note that journals are ranked by how well they are cited and the petitioner has not provided evidence that journals in his field are highly ranked based on an average of seven citations per article, the most any one article authored by the petitioner had received as of the date of filing. In a preemptive response to counsel's predictable assertion that such evidence was never requested,[4] we note that it is counsel who has claimed for the first time on motion that 10 citations is significant[5] and it is the petitioner's burden to provide evidence to support such claims. Ultimately, we do not find seven and four citations to be significant.[6]

Counsel also challenges the AAO's concern that the petitioner's patent for a waterproof bandage was unrelated to his current work. Counsel states that the patent "by itself is proof of accomplishment whether or not it is related to any courant [sic] project." First, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7. Thus, the petitioner would need to demonstrate not only that he has patented the bandage, but also that it has generated interest in the field. The record contains no evidence of any interest in licensing or marketing the innovation. Finally, the purpose of examining the petitioner's past record is to determine whether it justifies projections of future benefit. *Id.* at 219. It defies logic to assert that contributions completely unrelated to the benefits proposed by the petitioner are relevant. As the petitioner has declined to respond to the AAO's concern with evidence that the bandage is in any way related to his current work, we uphold our previous finding on this issue.

Next counsel challenges the AAO's concern that only two letters from the pharmaceutical industry supported the claim of benefit to that industry. Counsel asserts that this concern "demonstrates a very poor understanding by the AAO officer of the relationship between Academia and Industry." Counsel correctly notes that "ANY research scientists or professor working on a drug related chemistry in an academic setting will know about and understand what is fundamentally important to the pharmaceutical industry." Counsel also correctly notes that much academic research is funded by the pharmaceutical industry. Counsel, however, fails to understand the AAO's real concern on this issue.

The AAO is not questioning the petitioner's references' knowledge of their area of testimony. In fact, the AAO accepted the claim that the petitioner's work has the potential to impact the pharmaceutical industry as claimed by acknowledging that the petitioner's work has the potential for national benefits. Rather, as is clear from the

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[4] Counsel raises similar assertions on motion in response to several of the AAO's other concerns.

[5] While the petitioner's references assert that he is widely cited, they do not claim any personal knowledge of the exact number of citations or specifically assert that 10 citations are significant.

[6] Counsel himself brings to our attention a case where the alien was cited 153 times.

two paragraphs after the sentence quoted by counsel, the AAO is looking for evidence that the petitioner's work has already had some impact on the field. The most persuasive evidence of an impact on the pharmaceutical industry would come from that industry itself. Yet, as noted by the AAO, the two letters from that industry make no claim to be applying the petitioner's work. Nor do the petitioner's academic references provide examples of pharmaceutical companies who are applying the petitioner's work.

Counsel then characterizes the AAO's statement that the reference from [redacted] does not indicate that anyone else at that company has taken notice of the petitioner's efforts as "perhaps the most ridiculous of all." Counsel uses the analogy of dismissing a Nobel laureate who fails to specify other Nobel Laureates with similar opinions.

In the paragraph preceding the statement being challenged by counsel, the AAO noted that the other pharmaceutical reference does not indicate that his company has begun implementing the petitioner's work or that it is directly relevant to anti-cancer drugs. Thus, it is clear that the AAO is looking for more than general statements that the petitioner's area of research is significant. We affirm our determination that Dr. [redacted] letter fails to establish the petitioner's influence in his field. In fact, Dr [redacted] asserts that the goal of the petitioner's work is to save time, money and effort. Dr. [redacted] only bases for concluding that the petitioner's research will eventually "produce fruit" are the petitioner's skills and knowledge. Dr [redacted] does not identify any past accomplishments, the crux of establishing eligibility according to *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219.

Next, counsel asserts that the AAO wrongly questioned counsel's unsupported assertion that the references were all "top figures in their field." Counsel asserts that such evidence was not previously requested and that there is no standard that such evidence be submitted. The petitioner submits evidence of the chemistry department rankings for Purdue University and the University of Wisconsin-Madison. Counsel further noted that the petitioner submitted reference letters from the National Institutes of Health (NIH), the University of Warsaw and two prestigious pharmaceutical companies.

It is counsel who first raised the issue of the references' standing in the field, asserting not merely that they were knowledgeable in their field, but that they are "the **world's top research experts**." Counsel's initial brief, p. 3. (Emphasis in original.) It stands to reason that where counsel makes such a claim, some evidence to support the claim should be found in the record. *See generally Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. For example, we would (and do) readily acknowledge the top tier status of references who indicate that they are Nobel Laureates or members of the National Academy of Sciences.[7] Conversely, while we accord all reference letters some weight, we do not presume that every professor at a highly ranked university or every staff scientist at a large federal agency or pharmaceutical company is a world leader in the field, as implied by counsel.

We do not question that the petitioner's references are experienced and knowledgeable in their fields. Moreover, some of the references clearly have impressive credentials: Dr [redacted] was the Head of the Chemistry Department at Xavier University of Louisiana until 1993; Dr [redacted] the Head and Principal Investigator at the National Nuclear Magnetic Resonance Laboratory at Madison and the

[7] These accomplishments are examples; we do not mean to exclude other comparable accomplishments.

international repository, BioMagResBank; and Dr. [redacted] is a member of several committees for the Polish Academy of Sciences.[8]

Even if we accepted that some of these references are world leaders in the field, we must look at the content of their letters. As implied in our previous decision, the letters all focus on the importance of the petitioner's project and his qualifications to work on that project. For example, Dr [redacted] views the petitioner's publication history, which is already part of the record, and asserts that he is "a key member of his research group at Purdue University." Dr [redacted] discusses the petitioner's project and the implications of the algorithm the petitioner is working on. At no point in his letter does Dr. [redacted] identify a single past accomplishment or explain how the petitioner has already influenced the field. Similarly, Dr [redacted] entire discussion of the petitioner's accomplishments is as follows:

> [The petitioner] is a graduate of Nanjing University, one of the top academic institutions in China, where he began a productive research career. Since July 2000, he has been working in one of the top protein chemistry laboratories in the world under the guidance of Professor [redacted] In that group, he has made important discoveries, which he has reported a major scientific meetings in the USA. His work on projects being funded by the US National Institutes of Health is being readied for publication in first-rate journals. The project he is working on is of fundamental importance to the [sic] our understanding of how activities of proteins can be controlled. This is a topic of great national importance.

We need not, and do not, accept nonspecific claims of accomplishments. Dr. [redacted] not identify a single discovery made by the petitioner or explain how it has influenced the field.

Finally, after reciting the petitioner's publication and presentation history, Dr [redacted]

> [The petitioner's] work includes spectrophotometry and fluorescence study of the interaction between beta-cyclodextrin and highly exposed tyrosyl or tryptophyl residues in proteins. This is interesting both to supramolecular chemists and protein chemists.

Dr [redacted] not identify any supramolecular chemists or protein chemists who are applying the petitioner's work and does not indicate that he himself is doing so. Dr. [redacted]

> Furthermore, his current project is "predicting protein reactivity from the amino acid sequence alone." This project, which is supported for four years by United State[s] National Institute[s] of Health [redacted] is critical for improving drug designs. Many currently employed drugs are protease inhibitors such as ACE inhibitors used to lower the blood pressure and the protease inhibitors used as the main component of AIDS cocktails. [The petitioner] is doing research to develop a method of prediction that allows one to predict the reactivity of all possible inhibitors of a given type so that the strongest possible, most specific possible and least specific possible sequences for the selected enzymes can be obtained. This will allow pharmaceutical companies to produce a drug KNOWING that they have the strongest possible drug, and now merely a good candidate for a specific market.

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[8] The record does not establish that these committees are all staffed with members of the Polish Academy of Sciences and that their academy is as exclusive as the U.S. National Academy of Sciences.

> This is incredibly important to both the Pharmaceutical companies and the end user. The Pharmaceutical companies will save time, money and effort and still produce a superior product, while the end user will be able to purchase a product knowing that he has the best and most potent product possible. This research is obviously in the national interest. [The petitioner's] presence in the United States is critical for the furtherance of his important research. His knowledge, experience, unique expertise, and abilities make him an extraordinarily talented scientist.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. None of the letters provided attest to such a past history.

Counsel's claim that the AAO failed to support its concern regarding the similarity of the reference letters is simply false. Not only did the AAO mention the similarities prior to page 7, contrary to counsel's assertion, but the AAO also provided numerous examples.

Specifically, on page 4, the AAO stated that a "letter by Professor emeritus [redacted] of Xavier University of Louisiana contains very similar assertions." On pages 4 and 5, the AAO quoted the following statements and phrases, although not in this order:

> "The algorithm will enable a pharmaceutical company to know they have the best of all possible drugs for a specific reactivity before putting a drug on the market." Dr. [redacted]

> "[T]he algorithm will enable a pharmaceutical company to know prior to putting a drug on the market that it actually has the best of all possible drugs for a specific reactivity." Dr. [redacted]

> "[T]he algorithm will enable a pharmaceutical company to optimize potency and specificity of certain drugs before putting them on the market." Dr. [redacted]

> "Many experts in [the petitioner's] field from different countries have cited [the petitioner's] work in top international journals." Dr. [redacted]

> "[The petitioner's] work has been cited many times by other scientists from different countries in top international journals." Dr. [redacted]

> "Many experts around the world have cited [the petitioner's] work in top scientific journals." Dr. [redacted]

> "[The petitioner's project] is of fundamental importance to the understanding of how reactivity of proteins can be controlled and predicted." Dr[redacted]
>
> "[The petitioner's project] is of fundamental importance to the understanding of how reactivity of proteins can be predicted and controlled." Dr[redacted]

Thus, counsel is wrong that this observation by the AAO is "pure hogwash." Not only does the record support the AAO's observation, the quotes used by the AAO in its decision provide examples of the similarities.

Counsel then attempts to explain these similarities based on the fact that the references were "aware of the criteria employed by CIS and of course, they would refer to these criteria." Other than the comment about citations, however, the similar statements quoted above have nothing to do with the "criteria" set forth in *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 215. Regardless, the AAO's observation of similarities was simply *one* of its concerns about the reference letters. The AAO also noted that while several of the references attest to the petitioner's impressive citation history, the petitioner's actual citation history does not support those attestations.

Unlike boilerplate requests for additional evidence, which reflect experience with what is typically missing from national interest waiver petitions, boilerplate language in reference letters suggests that, while the reference is affirming the information in the letter, he is relying on another source for that information. While we still give such letters some weight, it is not error to note the similarities. As stated above and implied in our previous decision, the most significant deficiency in the letters is their failure to identify a single past accomplishment by the petitioner. It is clear from *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219 that a history of past accomplishments with some degree of influence on the field is necessary for the benefit sought. Rather than address this deficiency, however, counsel has chosen to question the integrity of not only the Service Center, but also charges this independent office with being complicit in the director's alleged malfeasance in some type of bizarre conspiracy between this office and a single Service Center. Counsel's challenge that this office can only prove its objectivity by approving petitions from counsel's clients is not well taken. Based on the record, carefully reviewed on two occasions by this office, any prediction that the petitioner's current project will benefit the national interest is pure speculation.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of November 6, 2003 is affirmed. The petition is denied.